No. 89-485

In the Supreme Court of the United States

OCTOBER TERM, 1989

VICTOR ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that any error in the exclusion of evidence offered by petitioner was harmless.

2. Whether the denial of a continuance effectively denied petitioner the right to testify on his own behalf.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 869 F.2d 808.

JURISDICTION

The judgment of the court of appeals (Pet. App. C1-C2) was entered on March 28, 1989. A petition for rehearing was denied on April 27, 1989. Pet. App. B1-B2. The petition for a writ of certiorari was filed on June 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner

was convicted on one count of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to three years' imprisonment. The court of appeals affirmed.[1]

1. The evidence at trial is summarized in the opinion of the court of appeals and in the government's court of appeals brief. Pet. App. A4-A5; Gov't C.A. Br. 4-23.

At about noon on May 21, 1985, a bank in New Orleans, Louisiana, was robbed by a heavy-set man, approximately six feet tall, with dark hair and a dark beard, wearing sunglasses and carrying an attache case. After waiting in a rope line, the robber approached teller Tracy Ozio and handed her a note instructing her to hand over money from her drawer. She complied. Assistant branch manager Jeanne Soignet, who was in the next teller station, saw the robber hand Ozio the note, spoke with the robber, and also gave him money from her drawer. Two video cameras and a 35mm surveillance camera recorded the robbery. Gov't C.A. Br. 4-5.

Ozio, Soignet, and bank receptionist Eurilda O'Rourke had opportunities to see the robber during the course of the robbery. All three picked petitioner's photograph from a photo array presented to each of them separately by an FBI agent three days after the

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[1] Petitioner had been previously tried and convicted of the same offense. The court of appeals reversed that conviction on the ground that the district court had erroneously excluded expert testimony offered by the defense. See *United States* v. *Alexander*, 816 F.2d 164 (5th Cir. 1987).

robbery, and all three identified petitioner as the robber at trial. Gov't C.A. Br. 4-8.

The government also introduced evidence that petitioner had suffered financial difficulties in the months just before the robbery, including credit card cancellations, defaulted loans, suspensions of banking privileges, and mortgage foreclosure proceedings. Gov't C.A. Br. 8.

2. The petition presents questions arising from the denial of a motion for a continuance that petitioner made on the eve of trial and the exclusion of certain evidence offered by petitioner.

a. Petitioner's second trial was originally scheduled to begin on July 13, 1987. At his request, the trial was continued until Monday, August 3. On Friday, July 31, petitioner sought another continuance, claiming that he would be unable to withstand the rigors of a trial and that he was suffering from acute anxiety that would undercut his ability to testify on his own behalf. Pet. App. A2.

The district court immediately commenced a hearing on petitioner's motion and continued the hearing over the weekend. On Friday evening, petitioner offered only a "largely illegible" handwritten letter from an internist that, according to petitioner's counsel, indicated that the internist had examined petitioner the day before and had prescribed heart medication for him. Counsel also stated that petitioner's mental condition had worsened over the previous two weeks. Pet. App. A2, A3; Gov't C.A. Br. 27-29.

The court appointed a cardiologist to examine petitioner. On Saturday, the cardiologist testified that he had found no evidence of heart disease, that petitioner had been able to communicate effectively with

him during the examination, and that there was no reason why petitioner would be unable to withstand the rigors of a trial. Petitioner then testified concerning his physical and mental condition. Pet. App. A3. He disclosed that during the previous week he had performed his normal work and had prepared for his trial. Gov't C.A. Br. 28. After petitioner had completed his testimony, the district court observed (Pet. App. A4):

> It appears to me, having listened to [petitioner] for more than the past thirty minutes, that he is rational, thoughtful, coherent, calm, allert [sic], and I might say exceptionally allert [sic], very responsive, and his memory for detail seems to be extraordinary.

The district court allowed petitioner to present testimony by his psychiatrist the following day. The psychiatrist testified that, before being contacted by the defense the day before (Saturday), he had not seen petitioner for several weeks. Based upon a consultation shortly before he testified, the psychiatrist's opinion was that although petitioner was not "capable of testifying in the same manner in which he would have been at the point of all of [the doctor's] previous in-person contacts with [petitioner]," petitioner's anxiety could not "be said to be the result of mental disease or defect." Pet. App. A3; Gov't C.A. Br. 30. The district court denied the motion for a continuance.

b. After the government had completed its case in chief, petitioner called Detective Ron Richards of the New Orleans Police Department (NOPD) as a witness. Through Richards, petitioner sought to introduce what appeared to be a page from an NOPD daily report and eight color photographs of persons other than petitioner. According to the report, which was dated the day after

the bank robbery, Richards showed the photographs to two of the eyewitnesses to the bank robbery, Soignet and O'Rourke, and another individual, Rosa Mitchell; none of the witnesses made an identification. Black and white copies of six of the photographs were later used in the photo array – presented by the FBI to Soignet, Ozio, and O'Rourke – from which these witnesses chose petitioner's photo. Petitioner argued that Soignet's and O'Rourke's identifications were tainted because petitioner's photograph was the only one in the FBI array that they had not previously seen and rejected. Pet. App. A4-A5; Gov't C.A. Br. 10, 12-13.

The district court conducted a hearing out of the presence of the jury to determine the admissibility of the evidence. The FBI agent who had conducted the photo arrays from which Ozio, Soignet, and O'Rourke selected petitioner's photograph testified that he had no knowledge of any photographic identification procedure other than the one he had conducted. Officer Richards testified that although the presence of his name on the report (which was typed, not signed) indicated that he prepared it, he could not remember preparing it or taking any of the actions attributed to him. Specifically, although he recalled riding with the FBI agent to the bank when the agent conducted his photo identification procedure, Richards could not remember himself showing a photo array to any of the witnesses.[2]

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[2] In September 1987, in connection with petitioner's motion for a new trial, Soignet and O'Rourke provided affidavits stating that each had been shown only one photo display, by the FBI agent, and that no one from the NOPD had shown them photographs in connection with the robbery. Gov't C.A. Br. App. I.

Richards recalled, however, that he had not told the FBI agent that he had conducted a photo array. Memorandum and Order 6-7 (Jan. 22, 1988) [hereinafter Dist. Ct. Mem.]; Gov't C.A. Br. 12-14.[3]

The NOPD file on the robbery had previously been subpoenaed in September 1985, in connection with a suppression hearing that preceded petitioner's first trial. At that time, it did not include the purported daily report and accompanying photographs. See Gov't C.A. Br. 12, 41. Before the commencement of the second trial, petitioner's counsel issued a subpoena duces tecum to Richards directing him to produce the file. (Petitioner's counsel stated that she first suspected that a second photo array had been shown to some witnesses about a month before the trial. *Id.* at 11; see Dist. Ct. Mem. 15.) An NOPD officer delivered the file to petitioner's counsel on the first day of the trial. Counsel took possession of the file without notifying the government or the court of its production. Although Fed. R. Crim. P. 16 requires parties to provide reciprocal discovery of documents and photographs that are intended for use as evidence, petitioner's counsel also failed to produce the daily report or the accompanying photographs to the government before calling Richards to the stand. Dist. Ct. Mem. 15. During cross-examination of the government's witnesses, petitioner's counsel made no reference to any claimed photo identification procedure other than the one conducted by the FBI. The government received no notice whatever of petitioner's evidence until after the government rested. *Ibid.*

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[3] We have lodged copies of the district court's Memorandum and Order with the Clerk.

The district court excluded the evidence. In an opinion denying petitioner's motion for a new trial, the court cited three alternative grounds for that ruling. First, it concluded that any probative value that the evidence might have would have been outweighed by its prejudicial effect. The court explained that the proffered evidence would not have "cast any significant doubt on" the identifications made in connection with the FBI array; that all eyewitnesses "independently identified [petitioner] as the robber in court on two separate occasions"; that there was no suggestion that the principal eyewitness, Ozio, had been shown two photo arrays; and that the admission of the evidence "would have created the misleading impression that the government had tried to suppress this evidence." Dist. Ct. Mem. 9-10. Second, finding that the daily report was "completely lacking in trustworthiness" (*id.* at 12), the court concluded that Officer Richards' testimony was insufficient to establish any exception to the hearsay rule. *Id.* at 10-14. Finally, the court held that the defense's "violation of the criminal discovery rules," *i.e.*, the failure to make a timely disclosure of the evidence to the government, "also justified exclusion of the evidence." *Id.* at 14.[4]

3. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A9. The court concluded

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[4] Fed. R. Crim. P. 16(c) provides that if a party discovers evidence that is subject to discovery or inspection "prior to or during trial," the party "shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence." If a party violates a discovery obligation imposed by Rule 16, the court is authorized to "prohibit the party from introducing evidence not disclosed." Fed. R. Crim. P. 16(d)(2).

that the district court had not abused its discretion in denying petitioner's motion for continuance. *Id.* at A5-A6. The court found it unnecessary to determine whether the exclusion of evidence of the identification procedure allegedly conducted by Officer Richards was justified as a sanction for the defense's violation of Rule 16; the panel concluded that "admitting the excluded evidence would not have altered the outcome of this trial" and, accordingly, that any error was harmless. *Id.* at A7-A9.

ARGUMENT

1. Petitioner contends (Pet. 9-19) that the district court erred by excluding evidence that a second photo array was shown to two of the identification witnesses and that the court of appeals incorrectly determined that any such error was harmless. In his view, the court of appeals improperly failed to apply the harmless error test recognized by this Court in *Chapman* v. *California*, 386 U.S. 18 (1967). Pet. 12.

There is no merit to those contentions. Under *Chapman*, a violation of a defendant's constitutional rights is harmless when it is established "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. Here, while the court of appeals did not cite *Chapman* or use the language of that opinion, it held that "admitting the excluded evidence would not have altered the outcome of this trial." Pet. App. A9. The court of appeals' harmless error determination was entirely consistent with the requirements of *Chapman*, and it was fully supported by the record.

As the court of appeals noted, it was undisputed that the principal witness against petitioner, teller Ozio,

was exposed to only one photo array. All three eyewitnesses had good opportunities to see the bank robber; two of the witnesses were face-to-face with him as he demanded money. All three identified him as the robber from the FBI photo display three days after the crime. As the district court held in denying a motion to suppress these identifications, the witnesses "independently recognized his face and features." See *United States* v. *Alexander*, 816 F.2d 164, 170 (5th Cir. 1987). The court of appeals' assessment of the weight of the identification testimony against petitioner was amply justified and does not raise any issue deserving of further review.[5]

Moreover, although the court of appeals found it unnecessary to reach the question, the district court's decision to exclude evidence of the alleged second photo identification procedure did not violate petitioner's constitutional rights. In *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988), this Court held that a defendant does not have "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." See also *United States* v. *Nobles*, 422 U.S. 225, 241 (1975). Rather, the right to present evidence is subject to compliance

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[5] The photographs included in the petition cast no doubt on the court of appeals' harmless error determination. Although an expert called by petitioner provided an opinion, based on those photographs, that petitioner was not the robber, the expert conceded that the bank's photographs were subject to distortions that would affect a comparison. Gov't C.A. Br. 9-10, 15-16. In rebuttal, the government called an FBI expert in photographic comparison who demonstrated how various distortions in the bank's photographs and in petitioner's comparison photographs undermined petitioner's expert's opinion. *Id.* at 17-23.

with "firm, though not always inflexible, rules relating to the identification and presentation of evidence." *Taylor* v. *Illinois*, 484 U.S. at 411. Thus, while a trial court confronted with a violation of a criminal discovery rule "may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor," a willful and tactically motivated violation may justify exclusion of such evidence. *Id.* at 414-415.[6]

Petitioner does not dispute the district court's finding that the defense's failure to produce the daily report and accompanying photographs was a violation of Fed. R. Crim. P. 16. Moreover, the circumstances of this case justify the inference that this violation was deliberate and tactically motivated. Although petitioner's counsel conceded that she suspected a month before trial that there had been a second array and that she had possession of the evidence of such an array on the first day of trial, the defense withheld all notice of the evidence until after the government had rested. Significantly, petitioner's counsel chose not to raise the possible existence of a second array even during cross-examination of the eyewitnesses to whom that array had allegedly been shown, presumably to make it impossible for the government to address that allegation during its case in chief. As in *Taylor*, "the inference

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[6] See, *e.g.*, *Cox* v. *Wyrick*, 873 F.2d 200 (8th Cir. 1989) (preclusion of alibi testimony proper sanction for failure to respond to pretrial motion to produce names and addresses of alibi witnesses); *Chappee* v. *Vose*, 843 F.2d 25 (1st Cir. 1988) (preclusion of expert testimony proper sanction for defense's deliberate withholding of names of expert witnesses contrary to discovery agreement).

that [petitioner] was deliberately seeking a tactical advantage is inescapable." 484 U.S. at 417.

The district court recognized that its discretion to exclude the evidence was "limited by the Compulsory Process Clause," Dist. Ct. Mem. 16, but nevertheless concluded that exclusion was the appropriate sanction. By failing to provide timely discovery, the defense deprived the government of the opportunity, which Rule 16 is specifically designed to safeguard, to address the evidence during its case in chief. As petitioner's counsel undoubtedly foresaw, injecting the issue of a possible second array for the first time as part of the defense case could have created the completely unwarranted impression that the government had sought to cover up the existence of such an array. Further, the district court found that the circumstances surrounding the production of the evidence "cast a serious doubt upon [its] integrity and trustworthiness." Dist. Ct. Mem. 18; see *Taylor* v. *Illinois*, 484 U.S. at 417.[7] Under all of these circumstances, the district court's decision to exclude petitioner's evidence did not violate the principles recognized in *Taylor*.

Finally, the district court determined that the evidence was inadmissible even under the Rules of Evidence. Officer Richards could not recall preparing the purported daily report, which did not bear his signature, or conducting the identification procedure to which it referred. Based upon the insufficiency of this testimony and a finding that the daily report was "com-

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[7] As was noted above, the two eyewitnesses who, according to the daily report, were shown a photo array by Officer Richards subsequently provided affidavits stating that the only array they were shown was the FBI array. Gov't C.A. Br. 46 & App. I.

pletely lacking in trustworthiness" (Dist. Ct. Mem. 12), the district court held that petitioner had not established a foundation for any exception to the hearsay rule (*id.* at 13-14). The court also held that the evidence was inadmissible under Fed. R. Evid. 403 because "the danger of unfair prejudice to the government's case and of misleading the jury substantially outweighed the probative value of the evidence." *Id.* at 10. These evidentiary determinations would be sufficient to sustain petitioner's conviction, regardless of the disposition of the issues argued in the petition.

2. Petitioner also seeks further review of the denial of his eleventh-hour motion for a continuance. Pet. 19-26. A review of the circumstances surrounding the continuance motion, however, shows that there was more than sufficient justification for the district court's conclusion that petitioner's condition did not warrant a second continuance.

Trial courts have broad discretion to control their dockets, and the denial of a continuance can be reversed only for an abuse of that discretion. *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); see also *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). In this case, the district court denied petitioner's motion for a continuance on the basis of its determination "that [petitioner] was not suffering from any disease or defect which would prevent him from assisting in his own defense or from testifying in his own behalf." Pet. App. A6. Both the circumstances surrounding the motion and the evidence adduced during the hearing on the motion support the district court's finding.

After a week during which petitioner performed his ordinary work and assisted in the preparation of his defense, he filed a motion near the close of business on

the last working day before the trial was scheduled to begin. The motion was supported initially only by a handwritten letter by an internist suggesting that petitioner might have a heart condition. The district court, nevertheless, went out of its way to give full consideration to the issues raised by the motion. It immediately appointed a cardiologist to examine petitioner and received testimony on petitioner's condition over the weekend. The cardiologist testified that petitioner showed no evidence of heart disease, and the district court concluded, based on its own observation of petitioner's testimony, that petitioner was rational, thoughtful, coherent, calm, alert, responsive, and in full command of his memory.[8] Finally, although petitioner had not seen his psychiatrist for several weeks before filing the motion for a continuance, the court allowed petitioner an opportunity to consult with the psychiatrist and to present his testimony. The psychiatrist's testimony was ambivalent. While suggesting that petitioner would be able to testify more effectively if the trial were postponed, the psychiatrist conceded that petitioner's anxiety was not the result of mental disease or defect. Pet. App. A3.

Thus, contrary to petitioner's contention, there was no "uncontradicted" (Pet. 23, 27) evidence that he was incapable of testifying on his own behalf.[9] Rather,

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[8] It was entirely proper for the court "to consider its observations of" petitioner "in ascertaining his physical and mental capabilities." *E.g.*, *United States* v. *Brown*, 821 F.2d 986, 989 (4th Cir. 1987).

[9] Indeed, the description of the evidence that petitioner's counsel provided to the jury in her opening statement suggested that petitioner would be called to testify. See 17 R. 91-96.

testimony from petitioner's psychiatrist and the court-appointed cardiologist, along with the court's own observation of petitioner's condition, presented "classic credibility questions" that the district court was entitled to resolve in favor of adherence to the scheduled trial date. *United States* v. *Brown*, 821 F.2d 986, 990 (4th Cir. 1987). Applying an appropriately deferential standard of review, the court of appeals upheld the district court's finding that petitioner was capable of participating in his trial and testifying on his own behalf, and it declined to disturb the district court's exercise of its discretion to control its trial docket. Pet. App. A6.[10] These determinations present no question of general importance calling for this Court's review.[11]

During the trial, the defense did not suggest that there had been any change in petitioner's condition that might have disabled him from testifying.

[10] The court's decision to deny the continuance was further supported by the prejudice that a delay would have caused to the government. Several of the government's out-of-town witnesses had already arrived for the trial. Additionally, the prosecutor who had tried the case originally and was to handle the retrial was nearing the end of her pregnancy. A further delay in the trial might have required the assignment of a new prosecutor. Gov't C.A. Br. 27, 37.

[11] Other courts of appeals have upheld denials of continuances sought for health reasons at least as serious as those alleged by petitioner. See, *e.g.*, *United States* v. *Brown*, *supra* (defendant was in his sixties and had previously been hospitalized for strokes and other ailments); *United States* v. *Costello*, 760 F.2d 1123 (11th Cir. 1985) (defendant *pro se* had attempted suicide on morning of sentencing hearing and had been treated with Valium); *Bernstein* v. *Travia*, 495 F.2d 1180 (2d Cir. 1974) (defendant's previous myocardial infarction and current symptoms of angina pectoris made him especially vulnerable to a heart

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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attack); *United States* v. *Silverthorne*, 430 F.2d 675, 677 (9th Cir. 1970), cert. denied, 400 U.S. 1022 (1971) (defendant suffered from aggravated high blood pressure).

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